



Negotiated Agreements: Contracts for Non-Emergency Remediation of Contaminated Properties

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Fact Sheet # 6

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"Brownfields" are abandoned, idle or under-used industrial or commercial facilities, the expansion or redevelopment of which is adversely affected by actual or perceived environmental contamination.

Introduction

There are many challenges to the remediation and redevelopment of properties contaminated by hazardous substances. The issue of contamination is so important for commercial and industrial properties that a special term, brownfields, has been created to refer to them. Wisconsin has several resources to facilitate the cleanup and redevelopment of contaminated properties, including a specialized legal document called a **negotiated agreement**.

Negotiated agreements are available for contaminated sites that are undergoing non-emergency clean-up actions in response to a release of hazardous substances to the environment. This fact sheet answers questions about negotiated agreements and their benefits relating to the cleanup and reuse of contaminated properties, including brownfields.

Who is responsible for the cleanup of a contaminated site undergoing redevelopment?

Wisconsin's Spill Law applies to all contaminated sites, regardless of whether or not they are undergoing redevelopment. This law, s. 292.11, Wis. Stats., requires a person who possesses (i.e., owns) or controls a hazardous

substance, or who causes the discharge of a hazardous substance, to immediately notify the Wisconsin Department of Natural Resources (DNR) of the discharge. The Spill Law also requires the person to take the actions necessary to restore the environment. This law applies to new discharges (e.g. a spill) and to the discovery of past releases (e.g. contamination found during an investigation of an abandoned property).

What is a negotiated agreement and why is it a tool for cleaning up contaminated properties?

A negotiated agreement is a legal contract for properties undergoing non-emergency clean-up actions authorized by the Spill Law [s. 292.11(7) (d) and (e), Wis. Stats.].

The purpose of the negotiated agreement is to clarify the roles and responsibilities with regard to cleanup at a contaminated site. Often, the agreement will also include the responsibilities and limits on the long-term care and maintenance of the property.



The intent of an agreement is to provide a defined, yet flexible tool to encourage site cleanup, and in some cases, to involve the participation of a local government in those activities.



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Multiple properties affected by area-wide groundwater contamination could be included in a single negotiated agreement.

Who can enter into a negotiated agreement?

Persons who cause, possess or control a release of one or more hazardous substances or a local governmental unit can enter into a negotiated agreement. At a minimum, the two participants in the agreement are: (1) the DNR, and (2) the party or parties who are required or who are volunteering to conduct non-emergency clean-up activities. The party required to undertake cleanup under Wisconsin's Spill Law could be an individual, a business, or a local government. The contamination at the site must be such that public health is not in imminent danger.

Other parties with legal or financial interests in the site may also be parties to the agreement. This may include financial institutions, developers and potential purchasers.

Local governments may also play an intermediary role. Local government officials can enter into an agreement on behalf of the owners of the contaminated property if the property meets certain conditions further described in the next question.

What types of organizations are considered local governmental units and under what conditions can they enter into a negotiated agreement?

For the purpose of a negotiated agreement for non-emergency clean-up actions, a local governmental unit can be any one of the following: city, town, village, county, county utility district, town sanitary district, public inland lake protection and rehabilitation district, metropolitan sewerage district, community development authority, housing authority, redevelopment authority created under s. 66.1333, Wis. Stats.,

or public body designated by a municipality under s. 66.1337(4), Wis. Stats.

An eligible local governmental unit can enter into a negotiated agreement on behalf of owners of a contaminated property if the property is located in:

- ◆ a business improvement district, as defined in s. 66.1109(1)(b), Wis. Stats.;
- ◆ an area designated by the local governmental unit that contains two or more properties that are brownfields; or
- ◆ an area designated by the local governmental unit that contains two or more properties affected by a contiguous area of groundwater contamination.



How can a negotiated agreement spur redevelopment at a site undergoing cleanup?

Legal liabilities and financial responsibilities for cleanup play a big role in the redevelopment and reuse of contaminated properties, especially for complex sites. When these liabilities and responsibilities are defined in a negotiated agreement, the uncertainty can be greatly reduced. The parties to the agreement can more accurately estimate their financial investment during the clean-up process, even if the process is lengthy.

The clarification of each party's liability or responsibility can allow redevelopment and reuse to take place during the clean-up process with reasonable assurance that those parties respon-

sible for the cleanup will complete their obligations.

Are there additional advantages to a negotiated agreement for a non-emergency site cleanup?

Yes. A negotiated agreement provides flexibility to accommodate the needs and limitations of each site and every party to the agreement. For example, some developers are wary of becoming involved with contaminated properties for fear of acquiring liability for the site. An agreement will clarify who has responsibility for the cleanup and long-term care of the property.

The negotiated agreement also encourages timely progress for the cleanup of the site since it includes a schedule of necessary actions. This is useful for sites with historic releases, several sources of contamination, or multiple responsible parties.

In addition, extensive remedial actions, such as the cleanup of contaminated groundwater, can last for months or years. In these situations, negotiated agreements with schedules are beneficial to all parties.

What is included in a negotiated agreement?

Like any legal document, a negotiated agreement is customized for each situation. Terminology can vary, but generally the agreement will contain the following:

1. a preface or preamble that outlines the facts underlying the agreement;
2. a statement of purpose and the parties' obligations, which state the actions, responsibilities and conditions for each of the participants in the agreement;
3. what to do if the parties to the agreement do not complete their obligations;

4. site description, location, legal description of the property, site history, physical condition and known contaminants at the site;
5. work to be performed or schedule for remediation activities;
6. identification of project coordinators and report submittal requirements;
7. site access agreements;
8. provisions for amending the agreement; and
9. signatures of the parties to the agreement which may include business owner, chief executive officer, the DNR Secretary, and the top elected official of the local government, or other duly authorized individual.

At what point in the site investigation and remediation process can a property be covered under a negotiated agreement?

An agreement can be drafted and signed when all parties to the agreement feel confident that remediation activities can be adequately described and scheduled.

The preferred time to enter into an agreement is after the Remedial Action Options Plan has been reviewed by DNR staff because then there is sufficient information available to draft a remediation schedule. The statute does not prohibit entering into an agreement at an earlier point in the process, although the remediation schedule may not be as well-defined in that situation.



Site investigation and remediation involve several steps, but the basic sequence in the cleanup of a site includes the following (please consult the ch. NR 700 Wisconsin Administrative Code series for more information):

1. define the nature, degree and extent of contamination in accordance with ch. NR 716, Wis. Adm. Code, *Site investigations*;

2. evaluate and select remedial options in accordance with ch. NR 722, Wis. Adm. Code *Standards for selecting remedial actions*; and
3. design and implement remedy in accordance with chs. NR 718, 720, and 724, Wis. Adm. Code.

The design of the remedy is instrumental for the schedule of remediation activities in the negotiated agreement. However, there is flexibility for sites that utilize reliable technologies. As noted, it may be possible to draft a negotiated agreement before the final remedy is approved, although the schedule for conducting remediation activities may not be capable of being specified. In that scenario, another negotiated agreement may be necessary, to specify the remediation schedule.

How long will it take to develop a negotiated agreement for a site?

The negotiated agreement has technical and legal components, each with its own timeline. Each negotiated agreement will need to be customized because of site-specific considerations, parties, remedies, and schedule.

The time needed to draft and review a negotiated agreement depends on:

- number of parties to the agreement;
- complexity of the site;
- conditions imposed by each of the parties;
- availability of necessary documents; and
- number of changes requested by the parties during the drafting process.

How does a party request a negotiated agreement, in addition to the costs of site remediation?

Parties interested in developing a negotiated agreement should check Section 5 (Specialized Agreement) in the Technical Assistance and

Environmental Liability Clarification Request (Form 4400-237). There is a fee of \$1000, in accordance with ch. NR749, Wis. Adm. Code. Also, other requests for technical review and redevelopment assistance during the investigation and clean-up process have fees assessed on either an hourly basis under the VPLE process, ch. NR 750, Wis. Adm. Code (described below), or as a single fee under ch. NR 749, Wis. Adm. Code. The same form is used to submit requests for technical assistance, liability clarification, and specialized agreements.



Can a negotiated agreement be used for properties in the Voluntary Party Liability Exemption (VPLE) process?

Yes. The Voluntary Party Liability Exemption process (VPLE) gives a property owner limits on future liability if the cleanup of the entire property is carried out to completion.

A property owner in the VPLE program could enter into a negotiated agreement with one major modification from the typical negotiated agreement language. In contrast to other negotiated agreements, for VPLE program sites, the clean-up activities are conducted voluntarily. This gives the VPLE applicant the option to drop out of the process without enforcement action, but only if the VPLE applicant is not also the party responsible for the contamination, which is not the case for a typical negotiated agreement.

For property in the VPLE process, the negotiated agreement may include language for terms under which the DNR will grant the VPLE a Certificate of Completion (COC) at the completion of the investigation and cleanup.

Please see *Fact Sheet 2 - Voluntary Party Remediation and Exemption from Liability* (RR-506) for more information on the VPLE.

What will the DNR do if a party fails to comply with the conditions in a signed negotiated agreement?

Under s. 292.11(7)(e), Wis. Stats., the DNR has the authority to refer a party or parties in violation of a negotiated agreement to the state Department of Justice for enforcement action under s. 299.95, Wis. Stats. The Department of Justice may seek an injunction to enforce the terms of the agreement or may seek other appropriate relief from the circuit court.

Does a party need to enter into a negotiated agreement in order to buy/sell a contaminated property or are there other options that can promote property transfer and redevelopment of contaminated properties?

A negotiated agreement is one of a variety of options to clarify roles and responsibilities with respect to the cleanup and reuse of contaminated properties. The parties involved can select the option that best suits their needs from several tools.

Other options include **private agreements** between property buyers and sellers defining responsibilities for cleaning up properties. In many cases lenders, buyers, sellers, and local governments enter into indemnification agreements when they negotiate a property sale and development.

Unlike a negotiated agreement, DNR is not a party to these private agreements, but private agreements accomplish similar objectives to negotiated agreements in that they can address issues such as:

- responsibility for clean-up expenses;

- definition of the acceptable level of cleanup;
- consequences to a party that fails to adhere to the agreement;
- length of time the indemnity will last, and what happens in the event of the sale or merger of one the participants;
- burden of proof when determining at what point in time the contamination took place; and
- responsibility for maintaining long term liability including any fines, third party claims or loss of profits that could occur.

In addition to private indemnification agreements, owners may want to utilize other tools provided by DNR, such as the **VPLE process** mentioned on page 4. The VPLE exemption limits long-term liability, and the exemption is transferable to any new owner of the property.

Another option is that parties may request liability clarification letters from the DNR to help describe the liabilities of various parties for site-specific situations. See the Technical Assistance and Environmental Liability Clarification Request (Form 4400-237), which is available on the Internet at: <http://dnr.wi.gov/org/aw/rr/archives/pubs/4400-237.pdf>. More information about these letters can be found in *Fact Sheet 11-General Liability Clarification Letters* (RR-619).

To discuss the best option for a specific property, contact the appropriate regional DNR Remediation and Redevelopment (RR) staff listed on page 6.

Is there a sample agreement to see if it is appropriate?

Examples of general conditions and the structure of a negotiated agreement are available by contacting RR staff in Madison or at any DNR regional office listed below. Staff are also available for assistance with any technical aspects of your project.

Regional DNR Land Recycling Team Contacts

Questions about negotiated agreements should be directed to the Land Recycling Team contact in your local DNR regional office. Please see the map to determine which region contains your property.

NORTHERN REGION (NOR)

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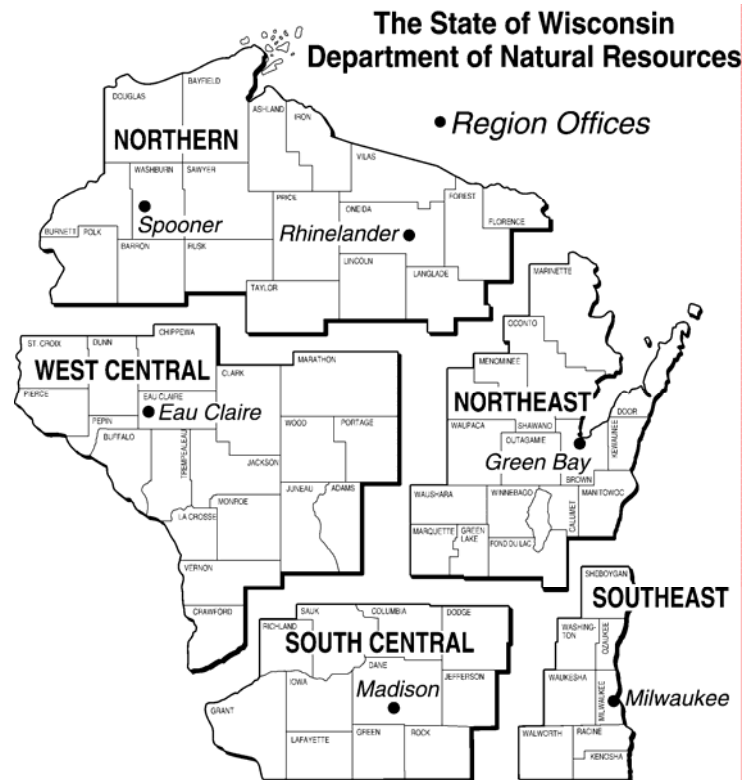
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For More Information

To order this and any other publications, or to find out more information about the Remediation and Redevelopment Program, please check out our web site at <http://dnr.wi.gov/org/aw/rr/>

This document contains information about certain state statutes and administrative rules but does not necessarily include all of the details found in the statutes and rules. Readers should consult the actual language of the statutes and rules to answer specific questions.

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